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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE TAX COMMISSION)	
OF UTAH,)	
)	
Plaintiff-Appellant,)	Case No. 14658
)	
vs.)	
)	
DEPARTMENT OF FINANCE,)	
STATE OF UTAH,)	
)	
Defendant-Respondent.)	

BRIEF OF APPELLANT

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OF THE STATE OF UTAH

STATE TAX COMMISSION
OF UTAH,

Plaintiff-Appellant,

VS.

Case No.14658

DEPARTMENT OF FINANCE,
STATE OF UTAH,

Defendant-Respondent.

BRIEF OF APPELLANT

NATURE OF THE CASE

This is an appeal by the Utah State Tax Commission, from an Order of the Third District Court, Salt Lake County, State of Utah, granting the oral Motion for Summary Judgment on all issues in favor of the Utah State Department of Finance, and denying the Tax Commission's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have the trial court's Order reversed, for an Order declaring Utah Code Annotated, Section 31-14-4 (1953) lawful and valid, for an Order granting Summary Judgment in favor of the plaintiff and requiring defendant to pay the taxes lawfully due and owing, or in the alternative to remand the case to the District Court to resolve all genuine issues of material fact.

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STATEMENT OF THE FACTS

The Utah State Tax Commission (hereinafter referred to as "Tax Commission" or "plaintiff") is a body politic charged with certain duties and responsibilities as set forth in the Utah State Constitution and the Statutes of the State of Utah, including Utah Code Annotated, Section 59-5-46 (1953). One of the Tax Commission's primary functions is to see that the tax laws are administered properly. Pursuant to this responsibility, the Tax Commission attempted to collect taxes which were owing from the State Insurance Fund pursuant to Utah Code Annotated, Section 31-14-4 (1953) the relevant portions of which, are as follows:

"Every insurance company engaged in the transaction of business in this state shall pay to the State Tax Commission, on or before the thirty-first day of March in each year:

(1)....(b) A tax of 1% of the total premiums received by it during the next preceding calendar year from insurance written within this state by any insurance fund or funds created by Charter 100, Laws of Utah 1917, to be collected by the State Tax Commission and to cover into the State Treasury to the credit of the State General Fund. This tax shall be in addition to any and all taxes levied under this section.

* * *

(3) Every insurance company engaged in the transaction of business in this state writing workmen's compensation or occupational disease disability insurance shall pay to the state tax commission, on or before the thirty-first day of March in each year, a tax of 3-1/4% of the total premiums received by it during the next preceding calendar year from workmen's compensation or occupational disease disability insurance, subject to all

provisions, limitations and exceptions contained in this section. The state tax commission shall pay all of the tax collected except the 1/4% into the state treasury to the credit of the special fund provided for in subsection (1) of section 35-1-68. The balance of the tax collected shall be paid into the state treasury to the credit of the state general fund. No tax that is to be transferred into the general fund shall be collected on premiums received by the department of finance in the state insurance fund from the state and its several departments and from counties, cities, towns, school districts, or any other self-insured political entities.

The State Insurance Fund is one alternative from which employers may choose, to provide their employees with workmen's compensation insurance. The cost of its premiums are only fifty to seventy percent of the cost of premiums of the other two methods, private insurance carriers and self-insurance.

The State Insurance Fund (also referred to herein as the Fund) is administered by the Utah State Department of Finance (hereinafter referred to as "Department" or "Defendant"). The Department has repeatedly refused to pay the tax imposed by U.C.A., Section 31-14-4(1)(b) (1953), claiming it is unconstitutional.

The State Insurance Fund is established, and its operations are governed and regulated, by Chapter 3 of Title 35 of the Utah Code Annotated, to which the numbers hereafter will largely refer. It has been held by this Court that it "is a state-administered mutual insurance program established by the Legislature for the purpose of insuring employers against liability for compensation and assuring to the persons entitled

law." Gronning v. Smart, 561 P.2d 690. The State Insurance Fund is a public fund and is publicly administered by a public body, the Finance Commission. Chez v. Industrial Commission of Utah, 62 P. 2d 549, 90 Utah 447. While it is a "public fund" it is also not public money to be spent in any manner desired by the public authorities, but rather the legislature, in Title 35, Chapter 3, U.C.A., has set forth the relationship between the State Insurance Fund and other state agencies.

The State Insurance Fund is very unique as it is literally in a class by itself. While it is similar to private insurance companies in that it is set up and established to provide compensation to injured parties and to protect other parties against potential liabilities, it is also a form of self-insurance.

The State Insurance Fund (also referred to herein as the Fund) is administered by the Utah State Department of Finance (hereinafter referred to as "Department" or "Defendant"). The Department has repeatedly refused to pay the tax imposed by U.C.A., Section 31-14-4(1)(b)(1953), claiming it is unconstitutional.

The State Insurance Fund is established, and its operations are governed and regulated, by Chapter 3 of Title 35 of the Utah Code Annotated, to which the numbers hereafter will largely refer. It has been held by this Court that it "is a state-administered mutual insurance program established by the Legislature for the purpose of insuring employers against liability for compensation and assuring to the persons entitled thereto the compensation provided by law." Gronning v. Smart, 561 P.2d 690. The State Insurance Fund is a public fund and is publicly administered by a public body, the Finance Commission. Chez v. Industrial Commission of Utah, 62 P. 2d 549, 90 Utah 447. While it is a "public fund" it is also not public money to be spent in any manner desired by the public authorities, but rather the legislature, in Title 35, Chapter 3, U.C.A., has set forth the relationship between the State Insurance Fund and other state agencies.

The State Insurance Fund is very unique as it is literally in a class by itself. While it is similar to private insurance companies in that it is set up and established to provide compensation to injured parties and to protect other parties against potential liabilities, it is also

very dissimilar in all other respects, and some of the unique characteristics of the Fund are as follows:

1. The Fund is established as a non-profit organization so that the premiums need not be high enough to produce a profit, but only to cover the claims which are filed by injured employees against the Fund.

2. The Fund does not have any investors or shareholders who require a return on their investment.

3. The Fund does not employ salesmen who earn commissions, so no sales commissions are paid by the Fund.

4. The administrative expenses of the Fund are provided by way of appropriation from the resources of the Fund by the legislature, but they are reduced substantially below those expenses for private insurance companies because:

a. The commission of finance administers the fund, writes compensation insurance and conducts all of the business appertaining thereto. Section 35-3-3, U.C.A.

b. The commission of finance must rate the hazards relating to accidents and occupational diseases; and must establish the premiums for those hazards. Section 35-3-4, U.C.A.

c. The commission of finance must make agreements for the settlement of claims, compromise claims of doubtful validity and determine to whom and through whom payments are to be made. Section 35-3-5, U.C.A.

d. The commission of finance must issue the policies of insurance and must prepare all of the necessary forms, agreements and policies. Section 35-3-6, U.C.A.

e. The commission of finance must receive all of the premiums paid to the fund and must then transmit those funds to the State Treasurer. Section 35-3-7, U.C.A.

f. The commission of finance must receive the written notices of withdrawal from any employer withdrawing from the Fund. Section 35-3-8, U.C.A.

g. The commission of finance has the responsibility to determine if any of the risks should be reinsured with any other insurance carrier and to then enter into any necessary reinsurance agreements. Section 35-3-9, U.C.A.

h. The commission of finance has the full responsibility to establish the appropriate rates, set up and maintain an adequate reserve, and to keep an accurate record of the premiums received, the administration expenses, the claims disbursed, and must further keep separate records for each individual employer. Section 35-3-10, U.C.A.

i. The commission of finance must adopt and promulgate all of the necessary rules and regulations.

Section 35-3-11, U.C.A.

j. The commission of finance has the responsibility to collect, by civil action in court if necessary, any amounts owed to the Fund by any employer. Section 35-3-17, U.C.A.

k. The State Treasurer is the custodian of the Fund, and must wisely invest those funds and must then issue the appropriate vouchers on the Fund. Sections 35-3-12 and 13, U.C.A.

l. The State Insurance Fund is provided with free legal counsel by the state Attorney General and by the various county attorneys. Section 35-3-20, U.C.A.

m. Audits on the State Insurance Fund are performed by the State Auditor, presumably without charge, whereas private insurance companies must retain an independent certified public accounting firm to perform audits.

5. While Section 35-3-1, U.C.A., does provide that the administrative expenses are to be provided by legislative appropriation from the resources of the Fund, the record in this case does not disclose what amounts, if any, were appropriated by the legislature to pay for those administrative expenses, nor does the record in this case disclose the amounts of such administrative expenses for any of the years in question.

6. Insurance companies, which pay a Utah insurance premium tax, including the State Insurance Fund, are exempt

from the Utah Taxpayer's Guide. This document is provided by the Utah State Library and is not subject to the Utah State Library Services and Technology Act, administered by the Utah State Library.

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7. Largely because of the factors cited above, the State Insurance Fund has been able to provide the insurance to employers for only fifty (50) per cent to seventy (70) per cent of the premiums which are otherwise charged by private insurance carriers.

8. Prior to 1971, when the statute in question in this proceeding was enacted by the legislature, the State Insurance Fund paid a lower total premium tax than private insurance carriers because the Fund did not pay a premium tax on premiums received from governmental agencies or political subdivisions, nor on the occupational disease disability portion of the premium received from other employers, whereas, private insurance carriers did pay a premium tax on those premiums.

ARGUMENT

POINT I

THE DIFFERENCE IN TAX RATES BETWEEN THE STATE INSURANCE FUND AND OTHER PRIVATE INSURANCE CARRIERS IS BECAUSE OF THE ADDITIONAL BENEFITS AND SERVICES WHICH ARE PROVIDED TO THE STATE INSURANCE FUND BY THE STATE AND ITS OFFICERS AND AGENCIES, AND DIFFERENCES IN TAXES ARE PERFECTLY ACCEPTABLE WHEN THERE IS ALSO A DIFFERENCE IN THE BENEFITS AND SERVICES PROVIDED BY THE TAXING AUTHORITY.

As mentioned, the Fund is a non-profit, publicly-administered insurance plan designed to provide employers with relatively inexpensive workmen's compensation insurance. The Fund is able to offer lower premiums because of two basic reasons. First, the Fund, as a creation of the

State Legislature which was provided its initial capital by legislative appropriation, does not have shareholders who must be provided with an annual return on investment, and secondly, and most importantly, the State of Utah provides many services to the Fund which are not provided to any other private insurance company or self-insurer.

A prime example of those additional services which are provided to the Fund by the State of Utah without any direct charge is that the Fund has received free legal services in this case as well as in Gronning v. Smart, supra. As this Court is well aware, legal services can be very expensive and free legal counsel constitutes a substantial benefit to the Fund, which by its genesis, function, and purpose is a litigious type of organization. Further, if the Fund does receive free auditing and investment services by the State Auditor and State Treasurer, those are very valuable services and benefits to an organization in a fiduciary capacity with large amounts of funds to invest and for which to account. If these services were not provided free of charge, then the Fund, as is necessary with private insurance carriers, would have to hire highly paid executive employees to invest the funds, and would also have to hire a certified public accounting firm to perform an audit on the books and records of the Fund.

Because the state provides these services and benefits to the State Insurance Fund, it can also require the Fund to help support their cost through the use of taxation, and

that rate of taxation may be different when additional services are provided than it would be for other insurers for which those services are not provided.

In Union Pacific Railroad Company v. The City and County of Denver, 182 Colo. 136, 511 P. 2d 497 (1973), plaintiffs contended that the tax imposed upon them, which was based upon the number of employees working in Denver, was unconstitutional because it placed an undue burden on interstate commerce. The court disagreed by upholding the ordinance in question. The Court, in quoting from a United States Supreme Court decision, Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940), stated:

"For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society.

* * * * *

The simple but controlling question is whether the state has given anything for which it can ask return. (at page 499) (emphasis added.)

The Court added that the tax was not on the privilege of doing interstate business but on the privilege of using services and facilities provided by the City of Denver.

"The clear purpose of the tax is to require that businesses located within Denver pay a fair share of the expenses incurred by Denver in providing those services and facilities." (at page 499) (emphasis added.)

The tax in our present situation, although factually different, is based on the same reasoning. The State Legislature is requiring those who receive the benefits of the State Insurance Fund to help meet the expenses the state incurs by providing the various services set forth in the statement of facts.

An earlier Utah case pronounced this court's adherence to that principle. In Garrett Freight Lines v. State Tax Commission, 103 Utah 390, 135 P. 2d 523 (1943), the Court declared:

"Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens." (Page 526).

Whether or not the tax reflects the exact amount of benefits received is of little import unless the tax is not a fair approximation or is discriminatory or excessive. The court in the Union Pacific case, again quoting from the U. S. Supreme Court (in the case of Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U. S. 707, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) added:

"[W]hile state or local tolls must reflect a 'uniform, fair and practical standard' relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." (Page 499)

There exists no rule which requires a state to impose a tax exactly equal to the expenditures spent by the state in maintaining a particular program. Further, the state is not required to use the best plan or formula for imposition of a tax. It may use any plan that is not oppressive or excessive and which reasonably reflects a close approximation of services provided.

Apparently, the State Insurance Fund wants the best of everything. It wants lower insurance premiums, low cost administrative services, free legal services, free auditing services, free investment services, and lower or equal taxes. Unfortunately, services are never free. And as a result, those receiving the benefits of the services must pay for them.

This principle was discussed by the Utah Supreme Court in Salt Lake City v. Bennion Gas and Oil, 80 Utah 530, 15 P. 2d 648 (1932). Although the case involved an inspection fee rather than an occupation tax, the dicta in the opinion is applicable.

"The amount of the inspection charge is primarily with the Legislature and a statute will not be held unconstitutional as providing for an excessive charge unless it is so unreasonable and disproportionate to the service rendered as to attack the good faith of the law. * * *" (Cite omitted) (Page 650) (Emphasis added).

The court, in discussing the fee, declared:

"If expenses are incurred in the exercise of this police power, some one must pay them, and it is only fair that the private corporation enjoying the franchise and serving the public for profit should bear this burden." (at page 649)

While a distinction may exist between an inspection fee and an occupation tax, the principle behind the two is the same; namely, the party receiving the service should be required to pay for it.

The additional one percent (1%) tax imposed upon the State Insurance Fund is the Legislature's method of apportioning the costs of the services being rendered, and that tax should be upheld by this honorable court.

POINT II

THE LEGISLATURE HAS BROAD DISCRETION IN MAKING CLASSIFICATIONS FOR PURPOSES OF LEGISLATION, ESPECIALLY IN THE AREA OF OCCUPATION TAXES.

The Legislature is endowed with broad powers to determine legislative policy. In Sonitrol Northwest, Inc. v. City of Seattle, 528 P. 2d 474, 84 Wash. 2d 588 (1975), the Court, supportive of this position, stated:

"Legislative bodies have very extensive powers to make classifications for purposes of legislation." [citations omitted.]

And in O. G. Sansone Co. v. Department of Transportation, 127 Cal. Rptr. 799, 55 Cal. App. 3d 458 (1976), the Court added:

"[T]he legislature is vested with wide discretion in making the classification and . . . its decision as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [citations] The legislature need not treat similar evils identically or legislate as to all phases of a field at once [citation]; . . . a classification is not void because it does not embrace within it every other class which might be included [citation]."

When the legislature makes certain classifications, those classifications are presumed valid. This policy has been considered and supported numerous times by the Utah Supreme Court.

In Lehi City v. Meiling, City Recorder, 87 Utah 237, 48 P. 2d 530 (1935), it was stated:

"In approaching the subject we have in mind the rule that when an act of the legislature is attacked on grounds of unconstitutionality the question presented is not whether it is possible to condemn the act, but whether it is possible to uphold it. The presumption is always in favor of validity, and legislative enactments must be sustained unless clearly in violation of fundamental law. Wadsworth v. Santaquin City, 83 Utah 321, 28 P. 2d 161. Every presumption will be indulged in favor of legislation and only clear and demonstrable usurpation of power will authorize judicial interference with legislative action. Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878." (at page 247)

Section 31-14-4, U.C.A. (1953) is entitled to a presumption of validity. Unless respondents can clearly show that this section of the code is unconstitutional, it must stand.

Concerning the legislature's use of discretion in making laws, the courts generally allow the legislature even greater latitude than usual in the area of taxation; especially when the purpose of the tax is to increase revenue. In Menlove v. Salt Lake County, 18 Utah 2d 203, 418 P. 2d 227 (1966) the plaintiff urged the court to declare an ordinance unconstitutional which imposed a transient room tax upon innkeepers. In upholding the ordinance this court classified the tax as an occupation tax which was levied in order to increase revenue. The court, quoting from a prior U. S. Supreme Court decision, New York Rapid Transit Corporation v. City of New York, 303 U. S. 573, 58 S. Ct. 721, 728, 82 L. Ed. 1024 (1938) stated:

"The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states. [citations omitted] A state may exercise a wide discretion in selecting the subjects of taxation [citations omitted] particularly as respects occupation taxes, [citations omitted]. * * * (at page 230)

The court added:

"The constitutional provision which imposes equality and uniformity of taxation of property has no application to an occupation tax." (at page 229). (Emphasis added)

[See also Davis v. Ogden City, 117 Utah 315, 215 P. 2d 616 (1950).] The court further stated:

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"Where neither the constitution nor a statute imposes absolute restrictions on the power of taxation, the courts may not arbitrarily impose any, unless it clearly appears that the tax imposed is oppressive or clearly and unreasonably discriminatory, and this is an abuse of the taxing power. This court cannot set up its judgment against that of the legislature in determining who shall be required to contribute to the revenues." (at page 229)

Clearly the burden of proof is on the respondents. They must show that the tax imposed by Section 31-14-4 is oppressive or unreasonably discriminatory. This has certainly not been done in this case because no evidence whatever has been presented to the court. The nature of the tax in question, since it is not a property tax, does not require equality and uniformity. The legislature has not abused its taxing power simply because the rate of taxation assessed against the premiums paid into the State Insurance fund is not identical to that imposed upon private carriers. More must be proved than a difference in the rate of taxation to show that the legislature has overstepped its bounds. The principle involved in this tax is very similar to federal and state personal and corporate income taxes where the tax rate differs based on differing levels of income, but with no other distinctions in classification. The passage of Section 31-14-4 and the creation of the State Insurance Fund as its own classification was well within the legislature's power to make laws and therefore is valid.

POINT III

SECTION 31-14-4, U.C.A., IS A GENERAL LAW,
NOT A SPECIAL ONE.

The term "general laws" was defined in State v. Kallas, 97 Utah 492, 94 P. 2d 414 (1939), citing from 25 R. C. L. 814, as follows:

"Constitutional law--what are general laws. Laws which apply to and operate uniformly upon all members of any class of persons peculiar to themselves in the matters covered by the laws in question, are general and not special. (emphasis added) (at page 505)

In the Lehi City case, *supra*, the act being challenged created a metropolitan water district. It was urged that this enactment was a special law rather than a general one and hence violated Article VI, Section 26 of the Utah State Constitution. In rejecting this contention, the Utah Supreme Court stated:

"The mere fact that its benefits may, under present opportunities and conditions, be availed of by a part of the state only, does not mitigate against its validity as a general law. City of Pasadena v. Chamberlain, supra. While only one group of cities or towns may now attempt to organize under its provisions, yet at any future time other cities and towns may do likewise. The act is not limited to any particular cities or towns, or to any particular locality in the state, but it operates uniformly on every city or town which may choose to take advantage of its provisions. In form, as well as in substance, it is a general law and not special. Salt Lake City v. Salt Lake County, 60 Utah 423, 209 P. 207; In Re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004. (Emphasis added) (at page 249)

that this enactment was a special law rather than a general one and hence violated Article VI, Section 26 of the Utah State Constitution. In rejecting this contention, the Utah Supreme Court stated:

"The mere fact that its benefits may, under present opportunities and conditions, be availed of by a part of the state only, does not mitigate against its validity as a general law. City of Pasadena v. Chamberlain, supra. While only one group of cities or towns may now attempt to organize under its provisions, yet at any future time other cities and towns may do likewise. The act is not limited to any particular cities or towns, or to any particular locality in the state, but it operates uniformly on every city or town which may choose to take advantage of its provisions. In form, as well as in substance, it is a general law and not special. Salt Lake City v. Salt Lake County, 60 Utah 423, 209 P. 207; In Re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004. (Emphasis added) (at page 249)

In comparing this language to the present case it can be seen that Section 31-14-4 is limited at the present time to only the State Insurance Fund. However, not one employer is forced to participate. They do so because they find the State Insurance Fund more advantageous than the other alternatives, even with a slightly higher premium tax. The program is open to any employer who wishes to join. The State Insurance Fund is not administered in a manner which unfairly discriminates among employers. True, there is a distinction made between the Fund and private insurance carriers. But, as long as that distinction does not allow a person to exercise the privileges it offers while refusing it to another of like qualifications and under

like circumstances and conditions, it is not objectionable.

Section 31-14-4 is a general law and not a Special law, and is therefore constitutional.

POINT IV.

SECTION 31-14-4 DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A statute is violative of the Fourteenth Amendment if it is unreasonable, arbitrary or capricious. If there is any reasonable set of facts which might sustain the act, it is to be found constitutional. Sonitrol Northwest, Inc. v. City of Seattle, 528 P. 2d 474, 84 Wash. 2d 588 (1975). The burden of proof is on the one claiming the law to be discriminatory.

In O. G. Sansone Co. v. Department of Transportation, 127 Cal. Rptr. 799, 55 Cal. App. 3d 434 (1976), the court found that a statute permitting the Department of Transportation to withhold payments to contractors whose subcontractors had failed to pay their workers minimum wages was not unconstitutional. Plaintiffs in that case contended that the minimum wage law discriminated against public works contractors because it did not apply to contractors working on private construction projects. In response to this, the court, quoting from an earlier case, declared:

"Public agencies, generally speaking, afford a proper subject for legislative classification. [citation]."

The court also added:

"The Legislature may constitutionally single out a particular segment of industry for regulation without necessarily running afoul of the equal protection clauses of the state and federal constitutions." (At page 816)

The dicta in this case suggests that the Legislature may constitutionally single out a particular segment of an industry for regulation and it may also draw distinctions between public and private agencies for the purposes of classification. This being true, the Utah Legislature did not overstep its bounds in enacting Section 31-14-4. It is perfectly permissible to separately classify those employers who belong to the State Insurance Fund and those who insure their workers privately. This classification is not unreasonable simply because one is administered publicly and the others privately. This distinction becomes even more reasonable when the purpose of the classification is for taxation.

As was mentioned in the Menlove case, the Legislature has even broader power to make classifications for the purpose of taxation than it does in general. Unless the classification is unreasonable or arbitrary, the court must uphold it. In The State of Utah v. Samuel S. Taylor, 541 P. 2d 1124 (Utah 1975), the defendant asserted that he was denied equal protection of the law because the ordinance of which he complained discriminated against small businessmen. The ordinance required businesses to pay a license fee, the amount of which depended

upon the gross income of the particular business. "Defendant argues that this system of taxation casts a disproportionate burden on the small businessman and thus violates the equal protection clause of the Fourteenth Amendment." The Utah Supreme Court, in quoting from a United States Supreme Court decision which upheld a similar occupation tax, declared:

"The court stated that the rule of equality of the Fourteenth Amendment does not require exact equality of taxation, but only that the law imposing the tax shall operate on all under the same circumstances. The Court ruled that where a tax on the privilege of doing business was graded according to the value, it may not be deemed unequal in operation solely because it does not levy the same percentage on every dollar." (emphasis added) (at page 1125)

The Utah Supreme Court added:

"The United States Supreme Court has adhered to this interpretation that the equal protection clause imposes no iron rule of equality upon the states in the exercise of their taxing power. The state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use, or value." (at page 1125)

The Court further stated:

"Under a taxing statute, if the exempted persons or businesses may be included in a distinct class, then the equal protection of the laws has not been denied to those taxed. There is nothing unreasonable in the legislative determination to designate the insurance business as a distinct class and to create a separate scheme of taxation therefor." (at page 1126)

It seems rather apparent that the Legislature has broad power in enacting tax statutes. As stated in the

Taylor case, it also has the power to create a separate

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scheme of taxation for the insurance business. Section 31-14-4 is part of that taxation scheme. It is not arbitrary or capricious but is based on distinctions designed to increase revenue to pay for increased expenses without substantially adversely affecting any interested party.

In support of this policy, the Court in Texas Company v. Cohn, 112 P. 2d 522, 8 Wash. 2d 376 (1941), stated:

"When the rule is applied to a tax law, however, it should be done with due appreciation of the fact that usually the principal object, and very often the sole object of such a law, is to raise revenue for the support of the taxing government. Thus, the state may constitutionally tax one class and exempt other classes if the classification reasonably tends, in some lawful way, to facilitate the raising of revenue." (at page 529)

And in the Sonitrol case, supra, the Court said:

". . . [T]he object sought is the raising of revenue and so long as the rate is not so excessive as to be confiscatory, the tax is valid." (at page 477)

What is confiscatory? In the Sonitrol case, the plaintiff alleged that a Seattle ordinance was discriminatory and confiscatory. Plaintiff manufactured burglar alarms and was taxed at a rate of 70 times that of its competitors, who dealt in local alarms. Its tax was 7% compared to the 1/10 of 1% imposed upon the other companies. The Court held that the tax was not unreasonable.

"The fact that the higher tax rate on appellant's business may put him at a competitive disadvantage is of no moment. [citation]

"Only where a tax is confiscatory and intended to drive a class out of business altogether, will the competitive element be considered. [citation]" (at page 478)

The tax in the present case was just the opposite effect. It tends to distribute the taxes more evenly. As previously mentioned, the tax imposed by Section 31-14-4 is based on the amount of premiums paid by the employers. However, the premiums paid by those employers who belong to the State Insurance Fund is only 50 to 70% of the premiums paid by employers to private insurance carriers. To place the same rate of taxation on both groups seems grossly unfair. In effect, respondents are demanding the best of both worlds. They want lower premiums and lower taxes, even though they may be insuring the same occupational risks.

Applying Section 31-14-4 as it now stands, look at a hypothetical. Assume that a lineman working for a power company has premiums on his wages of \$1000.00 to a private insurance carrier. The tax on those premiums is 3-1/4% or \$32.50. If that same lineman's employer had purchased its insurance coverage through the State Insurance Fund, the premiums would have been 50 to 70% of that paid to the private carrier or \$500.00 to \$700.00. The tax on that amount is 4-1/4% or \$21.25 to \$29.75. Even with the additional one percent the taxes to the State Tax Commission are still less for

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to tax employers approximately the same amount for insuring the same type of risk. Under this system, private insurance carriers are not forced out of business because they can't compete with a public agency.

Additionally, a difference in the method of conducting a business has been upheld as a valid basis for taxation. In City of San Mateo v. Mullin, 59 Ca 2d 652, 139 P. 2d 351 (1943), the city passed an ordinance which required attorneys, among others, to pay an annual license tax. If two or more attorneys worked together the additional tax on every attorney over one was less than that paid for the license of the first attorney. This ordinance was attacked as being discriminatory and unconstitutional. The ordinance was upheld by the Court declaring it to be based on a reasonable classification. The Court also added:

"A difference in the method of conducting a business is generally a sound basis for classification, particularly if it appears that the tax was fixed in proportion to the amount of business, which may be determined by different but reasonable methods. [cite omitted] (Page 353)

Further the Court reasoned:

"The method of operation resulting in superior or more convenient service furnishes a reason for a distinct and separate classification. The power to license a business for the purpose of revenue involves the right to make distinctions between essentially different methods of conducting the same general character of business." (page 353)

It would seem that this reasoning is applicable to the case at bar. The services provided by the state

make the State Insurance Fund more convenient and attractive to potential members. It is able to offer lower premiums because it is not profit-oriented, and yet, it is in direct competition with private carriers. This distinction alone should provide a sufficient basis for taxation.

It is hard to believe that a 1% difference in taxation is unconstitutional when a difference of 70 times has been upheld. One percent is not confiscatory especially when the end result is to more evenly tax identical risks.

In Sonitrol Northwest, Inc. v. City of Seattle, 528 P. 2d 474, 84 Wash 2d 588 (1975), the Court summed up its responsibility in this type of case.

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear." (at page 478)

In the present case, the tax exacted is neither confiscatory nor unreasonable. It does not violate the equal protection or due process clause of the Fourteenth Amendment. Therefore, Section 31-14-4 should be declared valid.

POINT V

THE TRIAL COURT ERRED IN ITS GRANTING OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WERE STILL GENUINE ISSUES OF FACT WHICH NEEDED TO BE RESOLVED BEFORE A SUMMARY JUDGMENT COULD BE GRANTED IN FAVOR OF THE DEPARTMENT OF FINANCE.

In Bullock v. Deseret Dodge Truck Center, Inc. 11

Utah 2d 1, 354 P. 2d 559 (1960), this court stated the principle to be followed by the trial court when ruling on a motion for summary judgment.

"A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser shows that, 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor."

[See also Morris v. Farnsworth Motel, 123 Utah 289, 259 P. 2d 297, 298 (1953).] In essence, the court said that if any material fact is in dispute or if the losing party could show facts under which it would be entitled to judgment, then the Court must deny the motion for summary judgment.

In the present case both of these grounds exist.

To begin with, before a summary judgment could be granted in favor of the defendant, the Court would have to determine whether sufficient distinctions exist between the State Insurance Fund and private insurance carriers to justify the Legislature adopting separate classifications for purposes of taxation.

This question was never resolved at the trial level.

Additionally, several issues which would have a bearing on the question of sufficient differences between the two types of insurance programs were left unanswered. First, does the State Insurance Fund pay a portion of the State Treasurer's salary since by law he is the custodian of the Fund's accounts and he is required to invest the Fund's monies, or is his salary completely paid for by the State? Second, does the Fund pay for any of its legal services or are they all provided without cost by the Attorney General's Office? Third, the Director of Finance administers the State Insurance Fund. Does he receive compensation from the Fund for these services or is his entire salary paid for by the state? The same question could also be asked of the state employees who are directly under his supervision and control. Additionally, the record does not disclose exactly how the premiums for the State Insurance Fund relate to the premiums of private insurance carriers, or how the tax cost of a specific risk with the State Insurance Fund would compare and relate to the tax cost of that same risk with a private insurance carrier.

The Legislature presumably appropriates money to administer the State Insurance Fund from the monies of the Fund, but are they sufficient? Is the state partially subsidizing the program by way of additional money or through the form of free services? None of these questions were answered in the trial court. It appears that if any of these questions could

be answered in a light more favorable to the plaintiff than defendant's motion for summary judgment was granted prematurely and in error. In In Re Williams' Estates, 10 Utah 2d 83, 348 P. 2d 683, 685 (1960) the Court said that summary judgment is only proper if the pleadings, affidavits, etc. show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The moving party in our present case was not entitled to judgment as a matter of law. If the answers to the questions raised herein would show that the State Insurance Fund does in fact receive benefits from the state or would in any other way place the case of the State Tax Commission in a more favorable light, then defendant was not entitled to summary judgment. On the other hand, it is submitted that the statute on its face, when reviewed with the relevant provisions of the law, could have been, and should have been, upheld as valid by the lower court. Therefore, while the plaintiff-appellant believes that this honorable court should rule affirmatively in its favor, at the very least, the case should be remanded to the trial court for a determination of the genuine issues of fact which are still in issue in these proceedings.

CONCLUSION

The Legislature has been given broad powers in making classifications for the purpose of legislation. These

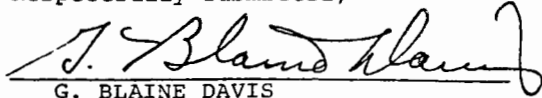
legislative decisions are entitled to a presumption of validity and must be upheld unless it is shown that they are palpably unreasonable. It is submitted that the legislature has determined that a slightly higher tax should be paid because of the additional benefits and services received by the Fund.

Section 31-14-4 is not unconstitutional simply because it makes a distinction between the State Insurance Fund and private insurance carriers. It must be assumed that employers considered the advantages as well as the disadvantages of both programs before deciding which to participate in.

Under Section 31-14-4, employers actually pay the same or a lesser amount of tax for insuring the same type of risk. The one percent difference in rates cannot be considered arbitrary or confiscatory. Section 31-14-4 must be upheld as a valid exercise of power by the legislature.

Therefore, it is submitted that this honorable court should hold that Section 31-14-4(1)(b) is valid and constitutional on its face, or should remand this case to the District Court to make determinations on the unresolved issues of fact.

Respectfully submitted,



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